Docket: 2022-1045(GST)I

BETWEEN:

SOUAD HAMMOUD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on January 24, 2023, at Windsor, Ontario

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Amanda De Bruyne

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal made in respect of the Notice of Assessment dated June 3, 2021 disallowing the Appellant's Goods and Services Tax / Harmonized Sale Tax (GST/HST) New Housing Rebate Application for Owner-Built Houses dated October 23, 2020, is hereby dismissed, without costs.

Signed at Montreal, Québec, this 10th day of May 2023.

"J.M. Gagnon"

Gagnon J.

Citation: 2023 TCC 55
Date: 20230510
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REASONS FOR JUDGMENT

Gagnon J.

I. Introduction

[1] The Appellant filed an application for a Goods and Services Tax/Harmonized Sales Tax (GST/HST) New Housing Rebate for owner-built houses (**Application**) in respect of a property located at 4400 Donato Dr., Lasalle, Ontario (**Property**). The Application was for a total rebate amount of $22,570.82 representing the Ontario provincial new housing rebate (**Rebate**).

[2] By notice of assessment dated June 3, 2021, the Minister of National Revenue (**Minister**) denied the Rebate.

[3] In filing her appeal before this Court, the Appellant filed a Notice of Appeal referring to the following reason in support of the appeal (emphasis added):

> GST/HST New Housing Rebate Appeal
>
> Based on subsection 256(2), we personally built this home for residential purposes, and decided to sell our home for certain reasons. These reasons include losing my job due to the pandemic, and my spouse losing a job opportunity also due to the pandemic. We made a personal decision to sell our home regarding the inability to afford all of the expenses. We built this home ourselves for the only purpose of it being our primary residence, as we provided all the proof in our initial application. We were the first individuals to occupy the complex after the construction, and

therefore qualify for the rebate. We have provided all of the necessary proof, and we are glad to provide any more if needed.

[4] In filing the Reply, the Respondent provided its position in respect of the Appellant's Notice of Appeal (emphasis added):

1. With respect to the first sentence of the Notice of Appeal, the Attorney General:

a. admits that a home was built;

b. admits that the Appellant and her spouse sold the home;

c. denies that the Appellant and her spouse intended to live in the home as a residence;

…

4. With respect to the fourth sentence of the Notice of Appeal, the Attorney General admits that the Appellant and her spouse built the home, but denies that the only purpose for building the home is for it being their primary residence, and states that the balance of sentence is advanced primarily by way of argument or relief sought and denies any allegation of facts incidentally contained therein.

…

[5] In addition, the Respondent confirmed in section 13 of the Reply the following assumptions of fact made by the Minister in assessing the Appellant's Application:

a) on March 14, 2019, the Appellant and her spouse purchased vacant land located at 4400 Donato Dr, Lasalle, N9H 0L5 Ontario (the "Land") for the sale price of $210,000;

[admitted by the Appellant]

b) the Appellant's father owns Superior Custom Builders, a corporation;

[admitted by the Appellant]

c) on April 23, 2019, construction began on a house on the Land (collectively the "Property");

[admitted by the Appellant]

d) Superior Custom Builders and Precision Roof Truss Ltd (the "Corporations") paid the expenses for the construction of the house on the Property;

[denied by the Appellant]

e) on March 20, 2020, the Appellant and her spouse listed the Property for sale;

[admitted by the Appellant]

f) on June 9, 2020, the Appellant lost her employment due to the global pandemic;

[admitted by the Appellant]

g) on June 10, 2020, the construction of the house on the Property was completed;

[admitted by the Appellant]

h) in November 2020, the Appellant sold the Property to a third party;

[admitted by the Appellant]

i) the Appellant and her spouse's annual employment income did not significantly change in 2020; and

[denied by the Appellant as stated]

j) the Appellant and her spouse did not live in the Property.

[denied by the Appellant]

[6] When asked to confirm her position in respect of each of the Minister's assumption in section 13 of the Reply, the Appellant admitted as true most assumptions, except assumptions in paragraphs d), i) and j).

[7] In essence, Mrs. Hammoud denied the statement in paragraph i) above because she believes that the word "significantly" is inappropriate. In the absence of detailed explanations from the Appellant, the Court understands that she is of the view that their total 2020 annual income changed more than what the Minister thought. However, no credible evidence was provided at the hearing to support her position in this regard.

[8] Paragraphs d) and j) above are denied by the Appellant as she does not agree with the Minister's position. The hearing dealt with these two points.

[9] The Appellant testified on her behalf and she was cross-examined by the Respondent. The Appellant also called her spouse as a witness. The examination in chief of her spouse was for a few questions. His cross-examination by the Respondent was longer.

[10] The Respondent did not call any witnesses.

II. Issue in dispute

[11] This appeal deals with the Appellant's entitlement to the Rebate, and more particularly, whether in connection with the Property, the conditions in paragraphs 256(2)(a) and (c) of the *Excise Tax Act*, RSC 1985, c E-15, as amended (**Act**) and paragraphs 46(2)(a) and (b) of the *New Harmonized Value-Added Tax System Regulations, No. 2*, SOR/2010-151 (**Regulations**) have been satisfied.

[12] In the event that all conditions are met, the appeal should be allowed. However, if one of these conditions is not met, the appeal should be dismissed.

- *Respondent's position*

[13] The Respondent is of the view that the Appellant and her spouse did not construct the house for use as their primary place of residence for purposes of paragraphs 256(2)(a) of the Act and 46(2)(a) of the Regulations, or alternatively, the Appellant and her spouse did not pay the HST claimed in the Application in respect of the supplies of improvements to the house as required under paragraphs 256(2)(c) of the Act and 46(2)(b) of the Regulations. During the Respondent's submissions, the Respondent described the two arguments as the Appellant and her spouse did not (i) intend to use the house as the primary place of residence and (ii) pay tax in respect of the supply regarding improvements to the house.

[14] According to the Respondent, the Appellant must make out a *prima facie* case to demolish the Minister's assumptions of facts to show on a balance of probabilities that the assessment is not correct. The facts of the case do not support a favorable conclusion for the Appellant. In addition, the Respondent believes that the HST was

not paid by the Appellant and the documentary evidence submitted at the hearing did not support the HST treatment claimed by the Appellant in the Application.

[15] The Respondent did not raise other reasons or conditions to support that the appeal should be dismissed.

- *Appellant's position*

[16] The Appellant's position is that both conditions raised by the Respondent are satisfied and as required by subsection 256(2) of the Act. The Appellant and her spouse were the first to reside in the house. It always been their intention to build the house for the Appellant, her spouse and their family. Moreover, the Appellant submits that they paid the HST claimed as rebate in the Application.

III. Context and evidence at the hearing

[17] At the beginning of her testimony, the Appellant was invited to introduce the reasons that led to the Appeal (emphasis added):

> Okay. So, basically, me and my husband built a home starting from -- in 2019, before the pandemic, and we built the home for ourselves with the sole intention of it being our primary residence.
>
> It ended up being that the pandemic hit us. I had lost my job. There were -- I guess beginning of 2020 is when, you know, Covid started happening and, from there, I knew that I wasn't going to, most likely, keep my job, just by how it was at work and in the health field.
>
> And we rely on both of our incomes so in -- down the line, we decided that it was best that we sold the house due to the fact that we were not able to keep up financially with the bill payments and the tax payments just because it ended up being a lot more than what we thought it would be.
>
> And especially then going down to only one income, it became really hard, so we decided it's the best choice to sell the house, and that -- we ended up selling it before the whole market went crazy as well so we were just kind of unsure of how things are going to happen in the year due to the pandemic because it was -- at that time, that's when it was at the most unsure and, you know, scary part, so we didn't know what was going to happen. We didn't want to risk anything so we decided to sell the house.

> And this whole thing was just us trying to get the rebate -- the tax rebate on all of the payments that we made to build the house because we did build the house just ourselves, just us two, me and my husband. …

[18] The Appellant and her spouse purchased on March 14, 2019 a vacant lot in Lasalle, Ontario. The house was subsequently built on that lot. At the time the vacant lot is purchased, the Appellant and her spouse lived in Windsor, Ontario. The purchase of the vacant lot by the Appellant and her spouse on March 14, 2019 is not in dispute.

[19] At the hearing, the Appellant raised some confusion about the position of the Respondent in the Reply with respect to whether the Appellant and her spouse built the house on the vacant lot. The Respondent admitted they did, but denied that the only purpose for building the home was for it to be their primary place of residence. The construction of the house started in April 2019 and ended in June 2020 for a total construction period of about 15 months.

[20] The Appellant confirmed during her cross-examination that the occupancy date of the Property was September 15, 2019. The Appellant confirmed that they were the first to live in the Property.

[21] At the beginning of the construction period, the domicile address of the Appellant and her husband was still 4525 Osaka Circle, Windsor, Ontario.

[22] During her testimony, the Appellant reconfirmed that they first listed the Property for sale in March 2020. Later during her cross-examination, and although the Appellant admitted at the outset the Minister's assumption in paragraph 13e) of the Reply that the Property was listed for sale on March 20, 2020, she later said that she did not want to say the wrong date, and when asked whether the listing was prior to the end of the construction June 10, 2020 she said she does not remember.

[23] On June 9, 2020, the Appellant lost her employment due to the global pandemic. The Appellant was clear about that date. However, when asked to confirm when she returned to work, the answer was not clear. She was sure she did not return to work during the summer of 2020. Most likely during the fall of 2020, but she could not recall when and did not want to mention any period.

[24] The Court was made aware that the sale of the Property was subject to an Amendment to Agreement of Purchase and Sale dated September 30, 2020 and ultimately transferred to the purchaser in November 2020.

[25] On October 23, 2020, the Appellant filed the Application and claimed the Rebate. The Rebate relates exclusively to the Ontario provincial new housing rebate.

[26] The Appellant filed a total of 13 exhibits at the hearing. Seven exhibits were filed to support that the Appellant and her spouse were living in the Property at the particular date referred to in each such exhibit. Only one exhibit with one document relating to the purchase of the vacant land, two quote sheets, and two invoices for a total amount of $14,166.36 was filed to justify the payment of construction bills for the house.

[27] No exhibit was filed by the Appellant contemporaneous with the Property moving date (September 15, 2019), neither in connection with the 4525 Osaka Circle, Windsor, Ontario they allegedly left to live in the Property. Bank Deposit Account Transaction Enquiry sheets were also filed as exhibits. These exhibits, although referring to a supplier, did not allow the Court to draw any conclusion in the absence of documents in support of the bank sheets.

[28] During the Appellant's cross-examination, the Respondent questioned the Appellant on the expenses claimed on the Application in respect of the construction of the house. Fifteen invoices submitted by the Respondent were addressed during the cross-examination. Most questions were about who paid the invoice, who is the client on the invoice, the purpose and the circumstances surrounding the invoice. In almost every case, the Respondent raised issues with the identity of the client name and the credit card holder.

[29] The exhibits filed by the Appellant showing that the Property was occupied by the Appellant and her spouse consisted in bills for natural gas, electricity, bank statements, driver's licence, licence plate, insurance brokers correspondence, internet service, pharmacy prescription receipt and car insurance slip representing expenses or documents showing the Appellant's name or the name of the Appellant's spouse and the Property address with respect to various periods between October 28, 2019 and November 19, 2021.

IV. Analysis

- *applicable law*

[30] In order to qualify for a rebate under sections 256 of the Act and 46 of the Regulations, the Appellant must satisfy, *inter alia*, the two conditions in dispute and set out in paragraphs 256(2)(a) and (c) and 46(2)(a) and (b) of the Regulations: [1]

> **256**
>
> […]
>
> (2) Where
>
> (a) a particular individual constructs or substantially renovates, or engages another person to construct or substantially renovate for the particular individual, a residential complex that is a single unit residential complex or a residential condominium unit for use as the primary place of residence of the particular individual or a relation of the particular individual,
>
> […]
>
> (c) the particular individual has paid tax in respect of the supply by way of sale to the individual of the land that forms part of the complex or an interest therein or in respect of the supply to, or importation by, the individual of any improvement thereto or, in the case of a mobile home or floating home, of the complex (the total of which tax under subsection 165(1) and sections 212 and 218 is referred to in this subsection as the "total tax paid by the particular individual"),
>
> […]
>
> the Minister shall, subject to subsection (3), pay a rebate to the particular individual equal to …
>
> [emphasis added]
>
> **46. Rebate in Ontario**

[1] The Regulations deal with the Ontario provincial new housing rebate. The Regulations prescribe a rebate, payable pursuant to section 256.21 of the Act, calculated as prescribed, where the test set out in subsection 46(2) of the Regulations has been met. The test in subsection 46(2) of the Regulations is the requirements outlined in subsection 256(2) of the Act.

> (2) If
>
> (a) an individual is entitled to claim a rebate under subsection 256(2) of the Act in respect of a residential complex that the individual has constructed or substantially renovated, or has engaged another person to construct or substantially renovate, and that is for use in Ontario as the primary place of residence of the individual or a relation of the individual, or the individual would be so entitled if the fair market value of the complex, at the time the construction or substantial renovation of the complex is substantially completed, were less than $450,000, and
>
> (b) the individual has paid all of the tax payable by the individual in respect of the supply by way of sale to the individual of the land that forms part of the complex or an interest in the land or in respect of the supply to, importation by, or bringing into Ontario by, the individual of any improvement to the land or, in the case of a mobile home or floating home, of the complex (the total of which tax under subsection 165(2) and sections 212.1, 218.1 and 220.05 to 220.07 of the Act is referred to in this subsection and subsection (4) as the "total tax in respect of the province"),
>
> …

[31] Subsection 299(3) of the Act states that an assessment, subject to being vacated on an objection or appeal and subject to a reassessment, shall be deemed to be valid and binding.

[32] Generally, in tax appeals, the burden of proof rests on the appellant. The appellant bears the burden of demolishing the Minister's assumptions of fact and proving, on a balance of probabilities, the facts justifying his or her position including that the assessment or reassessment is not correct. [2]

[2] The burden of proof in tax appeals was more recently discussed in various decisions of the Federal Court of Appeal and the Tax Court of Canada. Justice Webb in *Sarmadi* v *The Queen*, 2017 FCA 131 [***Sarmadi***] reviewed the law on burden of proof in tax appeals, but Justice Stratas and Justice Woods declined to provide a definitive opinion on this same issue. In *Eisbrenner* v *The Queen*, 2020 FCA 93 [***Eisbrenner***], Justice Webb, on behalf of the Federal Court of Appeal bench, reiterated the same line of reasons with respect to the burden of proof in tax appeals. The application for leave to appeal before the Supreme Court of Canada in *Eisbrenner* was dismissed (January 14, 2021). Since the *Eisbrenner* decision, the reasons of Justice Webb on the issue of the burden of proof in tax appeals have been confirmed or referred to in at least 4 other decisions of the Federal Court of Appeal: *Kufsky* v *Canada*, 2022 FCA 66 [***Kufsky***], *Chibani* v *Canada*, 2021 FCA 196, *European Staffing Inc.* v *Canada (National Revenue)*, 2020 FCA 2019 and *Van der Steen* v *Canada*, 2020 FCA 168 [***Van der Steen***]. The main decisions of the Tax Court of Canada on the same issue are the decisions of Justice Owen in *Morrison* v *The Queen*, 2018 TCC 220 and *Damis Properties Inc.* v *The Queen*, 2021 TCC 24.

[33] In *Hickman Motors Ltd.* v *Canada*, [1997] 2 SCR 336 L'Heureux-Dubé J. confirms that the initial onus on the taxpayer consists in demolishing the assumptions relied upon by the Minister to make the assessment. If the taxpayer puts forward at least a *prima facie* case, the burden of proof shifts to the Minister, who must prove the assumptions relied upon and rebut the *prima facie* case.

[34] A *prima facie* case is generally supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved.

[35] In *Eisbrenner*, Justice Webb on behalf of the Federal Court of Appeal bench, reaffirmed the conclusions he reached in *Sarmadi*:

> … In Sarmadi, I reviewed the various cases that have discussed the onus of proof issue. I also reviewed the context of an appeal to the Tax Court. I concluded that:
>
> > [61] In my view, a taxpayer should have the burden to prove, on a balance of probabilities, any facts that are alleged by that taxpayer in their notice of appeal and that are denied by the Crown. In most cases this should end the discussion of the onus of proof since the assumptions of fact made by the Minister in reassessing the taxpayer would generally be inconsistent with the facts pled by the taxpayer with respect to the material facts on which the reassessment was issued.
> >
> > [62] If there are facts that were assumed by the Minister in reassessing a taxpayer and that are not inconsistent with the facts as pled by that taxpayer, it would also seem logical to require the taxpayer to prove, on a balance of probabilities, that these facts assumed by the Minister (and which are in dispute and are not exclusively or peculiarly within the Minister's knowledge) are not correct. Requiring a taxpayer to disprove the facts assumed by the Minister in reassessing that taxpayer simply puts the onus on the person who knows (or ought to know) the facts. It also puts the onus on the person who indirectly asserted certain facts in filing their tax return that would be inconsistent with the facts assumed by the Minister in reassessing such taxpayer.
> >
> > [63] Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.
>
> [25] In paragraph 36 of *Sarmadi*, I had also noted that if the Minister alleges a fact that is not part of the facts that were assumed by the Minister in assessing a taxpayer or in confirming an assessment, then the Minister will have the onus of proof with

> respect to such facts (*Her Majesty the Queen v. Loewen*, 2004 FCA 146 at para. 11, 2004 D.T.C. 6321). [3]
>
> [emphasis added]

[36] In *Kufsky*, supporting the reasons of Justice Webb in *Eisbrenner*, Monaghan JA wrote:

> [99] In these reasons, I have chosen to refer to a *prima facie* case. That phrase has been used repeatedly to describe what a taxpayer challenging the Minister's assumptions must do. Some commentary suggests that *prima facie* case is intended to mean something less than "on a balance of probabilities". I am not convinced and endorse the approach Justice Webb outlined in *Sarmadi* v *Canada*, 2017 FCA 131, 2017 D.T.C. 5081, at paras. 61–63, repeated in *Eisbrenner* v. *Canada* 2020 FCA 93, leave to appeal to the SCC dismissed 2020 S.C.C.A. No. 334. However, for the Appellant's benefit, I have assumed that a *prima facie* case requires something less than a balance of probabilities. Nonetheless, she has failed.

[37] In *Van der Steen*, a unanimous decision, the Federal Court of Appeal confirms *Eisbrenner*:

> 26 In *Eisbrenner* v *Canada*, 2020 FCA 93, this Court confirmed that a taxpayer who pleads a particular fact in his, her or its notice of appeal to the Tax Court has the onus of proving that fact on a balance of probabilities when the Crown denies that allegation of fact. Mr. van der Steen would know whether he had the necessary donative intent in order for the payment of $65,000 to CLES to qualify as a charitable donation.

[38] In *Hong Kong Style Café Ltd.* v *The Queen*, 2022 TCC 9, Justice Bocock referring to Justice McPhee in *Xue* v *HMQ*, 2020 TCC 72 on *Eisbrenner*:

> 36 In *Eisbrenner* v *Canada* (2020 FCA 93 (F.C.A.)), the Federal Court of Appeal recently reviewed, the burden of proof upon an Appellant before the Tax Court. A taxpayer has the burden to prove any facts that are alleged by that taxpayer in their Notice of Appeal and that are denied by the Respondent.
>
> 37 Particular to tax appeals is the ability of the Respondent to plead and rely upon the assumptions made by the Minister. When this occurs, the taxpayer in order to be successful in their appeal, needs to demolish the properly plead assumptions that

[3] In *Ont. Human Rights Comm.* v *Simpsons-Sears*, [1985] 2 SCR 536, the Supreme Court of Canada confirmed the well-settled rule in civil cases is that the person who alleges must prove. See also, *F.H.* v *McDougall*, [2008] 3 SCR 41.

> are detrimental to the appeal. In the Reply filed in this matter, several key assumptions were set and relied upon by the Respondent as part of their evidence. Few, if any, of the assumptions were specifically dealt with in the evidence lead by the Appellants.
>
> [emphasis added]

[39] Justice Bowman, as he then was, in *Cadillac Fairview Corp. Ltd.* v *The Queen*, [1996] 2 CTC 2197 wrote:

> The appellant pleaded that the payments were made pursuant to the guarantees and this allegation was denied. Counsel for the appellant argued that since the Minister had not pleaded that he "assumed" that the payments were not made pursuant to the guarantees the Minister had the onus of establishing that the payments were not made pursuant to the guarantees. The question is, if not a pure question of law, at least a mixed one of law and fact. In any event the basic assumption made on assessing was that the appellant was not entitled to the capital loss claimed and it was for the appellant to establish the several legal components entitling it to the deduction claimed. … I do not believe that *Minister of National Revenue v. Pillsbury Holdings Ltd.* 1964 CanLII 1197 (CA EXC), [1964] C.T.C. 294, [1964] D.T.C. 5184, has completely turned the ordinary rules of practice and pleading on their head. The usual rule—and I see no reason why it should not apply in income tax appeals—is set out in Odgers' Principles of Pleading and Practice, 22nd edition at page 532:
>
> > The "burden of proof" is the duty which lies on a party to establish his case. It will lie on A, whenever A must either call some evidence or have judgment given against him. As a rule (but not invariably) it lies upon the party who has in his pleading maintained the *affirmative* of the issue; for a *negative* is in general incapable of proof. *Ei incumbit probatio qui dicit, non qui negat*. The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the onus lies, as a rule, on the plaintiff to establish every fact which he has asserted in the statement of claim, and on the defendant to prove all facts which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, etc.

[40] For the purposes herein, the foregoing summary means that the Appellant must prove at trial, on the balance of probabilities, not only the Minister's assumptions of fact that the Appellant believes to be unfounded, but also the allegations of fact pleaded in the Notice of Appeal in support of her position to the extent the Respondent does not admit them.

[41] On that basis, the Court can now determine whether the Appellant satisfied her burden of proof under paragraphs 256(2)(a) and (c) of the Act and 46(2)(a) and (b) of the Regulations, knowing that if one of these conditions is not met, the Rebate must be denied.

- primary place of residence – 256(2)(a) of the Act/46(2)(a) of the Regulations

[42] In the present case, paragraph 256(2)(a) of the Act requires an individual to construct or engage another person to construct for the individual, a "single unit residential complex" for use as the individual's primary place of residence or the primary place of residence of the individual's relation.

[43] For the following reasons, the Court finds that the Appellant has not successfully met her burden of proof under paragraph 256(2)(a) of the Act.

[44] First, an individual must construct a unit. Subsection 123(1) of the Act defines an "individual" as a natural person. Therefore, a natural person must construct or engage another person (who can be someone other than a natural person) to construct a unit. The Appellant is a natural person. The Respondent admitted that the Appellant and her spouse built the house on the vacant land. Therefore, this sub-condition is met.

[45] Second, the unit must be a "single unit residential complex", which is defined in subsection 256(1) of the Act to include a detached house, a detached house with a suite or, possibly, a duplex. This second sub-condition does not create an issue in the present case.

[46] Third, the purpose of the construction of the unit by the individual must be to use the unit as the primary place of residence of the individual or of his or her relation. A "relation" includes individuals connected by blood relationship, marriage or common-law partnership or adoption. Again, the relation requirement does not raise any issue in the present case.

[47] The concept of "primary place of residence" is not defined in the Act. Whether the Appellant had the requisite intention at the relevant time is a question of fact.[4] This sub-condition will be met if the Appellant has convinced the Court that she had

[4] *Fiducie Chry-Ca* v *The Queen*, 2008 TCC 423.

the correct intention at the relevant time regardless of whether she actually followed through on that intention. For purposes of paragraph 256(2)(a) of the Act, the relevant time is during the construction period of the house. This is the sub-condition the Court found the Appellant has failed to prove on the balance of probabilities.

[48] Actual use of the property may be evidence in some cases of the taxpayer's intention; however, it is not conclusive. [5] The Tax Court has held that a variety of indicia can be considered to determine whether the subjective intent is supported across the waypoints of occupancy:

> i) demarcation of primary place of residence by change of address;
>
> ii) the relocation of sufficient personal effects to the rebate property;
>
> iii) if no occupancy of the residence, was there cogent evidence of frustration of occupancy;
>
> iv) permanent occupant insurance versus seasonal or rental coverage;
>
> v) delivery of possession of previous primary residence to another;
>
> vi) if dual occupancy continues, then the rebate property must be more frequently occupied, more convenient to third party locations such as work, more convenient amenities and more suitable to the needs of the taxpayer. [6]

[49] However, ultimately, what is required is:

> [7] In the end, there are numerous decisions, each turning on their own facts, on the issue of a purchaser's intention to acquire a residence as a "primary place of residence" for the purposes of the rebate. A clear and settled intention to occupy the premises as a "primary place of residence", considered in the context of an individual's personal, family and work-related circumstances. A tentative, fleeting or whimsical intention does not suffice.
>
> [8] Parliament's use of the word "primary" also suggests that the purchaser must have a settled intention to centre or arrange his personal and family affairs around that property. The rebate is not intended for a secondary residence or "pied-à-terre". An individual can own multiple residences but would typically have only one "primary place of residence". [7]

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[5] *Kandiah* v *The Queen*, 2014 TCC 276.
[6] *Fard* v *The Queen*, 2022 TCC 42.
[7] *Kniazev* v *The Queen*, 2019 TCC 58.

[50] The fact that the Appellant may or may not live in the house is distinct from the intention that could motivate the Appellant to construct the house. In fact, the condition in paragraph 256(2)(d) of the Act relates specifically to the occupation of the house. This is the reason why the inherent fact of living in the house is insufficient to establish that the Appellant had the correct intention that paragraph 256(2)(a) of the Act prescribes.

[51] Based on the burden of proof discussion above, and considering that the Appellant added in her pleading in the Notice of Appeal that the intention was to built the house for the only purpose of it being their primary place of residence and the Respondent denied that fact in the Respondent's Reply, the Appellant bears the burden of proving, on a balance of probabilities, that she built the house for use as her primary place of residence.

[52] Only once all of the evidence at the hearing is presented, can the Court then determine whether the Appellant has satisfied this burden. [8]

[53] The intention of the Appellant was put forward through the testimony of the Appellant and her spouse. Both testified having built the house with the intent of living in the house. As mentioned earlier, some documentary evidence was also submitted to show that they moved in at a certain date.

[54] However, the offer for sale of the Property in March 2020 and the credibility issues relating to the Appellant's testimony and raised in theses reasons below seriously impact, in the Court's opinion, the conclusion that the Appellant has satisfied her burden of proof.

[55] The Court's impression on the merit of the additional comments made by the Appellant about the initial listing in March 2020 is to associate the Appellant's comments with the Appellant's statements made about her impossibility to remember the period she returned to work although she was clear about when she lost her employment in June 2020. No details were provided about her employment research and success. This situation leaves the Court unconvinced about a complete transparency and untainted testimony by the Appellant including with respect to the Appellant's additional remarks about the initial listing date. In the Court's opinion,

[8] See *Eisbrenner*.

these positions adopted by the witness result in a negative inference about the witness's credibility.

[56] During her cross-examination, the Appellant confused the credit card used to pay most construction invoices filed as exhibits by the Respondent. She confirmed the credit card being her spouse's old credit card, while during his cross-examination by the Respondent her spouse confirmed the credit card holder being either his father-in-law or mother-in-law (the Appellant's father and mother). In the Court's opinion, this factor also contributed to a negative inference in light of her credibility.

[57] Also, during her testimony, the Appellant described the circumstances and the reasons that motivated the couple to do business with the suppliers of Superior Custom Builders and Precision Roof Truss Ltd. In summary, when asked to explain why she and her spouse would be responsible for not paying the suppliers, she said that the suppliers would call her husband (emphasis added):

> Although the name of Superior Custom Builders was there, "It just shows -- like, they'll put "Superior Custom Builders" because <u>we just gave the name showing that, you know, we are going to come -- basically, giving a business like that is just kind of saying we're going to be coming for the next time if we decided to build, because we were thinking maybe down the future, if we ever wanted to build again … that's basically what we said to them when we were purchasing and it's just, like, you get a minor discount just because it's almost like a promise that, you know, you'll come back and we'll buy our flooring again from them</u> … [9]

[58] This response leaves the Court confused as to the genuine intention behind the construction of the house and the decision to offer for sale the house during construction in March 2020. The last paragraph of the Appellant's statement in paragraph 17 above leads the Court to raise the same uncertainty.

[59] In *Martinuzzi*, Justice Rip, as he then was, found that the appellant, who had purchased land and built a residence on the property, did not intend to use it as a primary place of residence. [10] The house was for sale during the construction and Justice Rip did not "believe that the installation of a 'For Sale' sign on the property during construction was a 'joke'".

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[9] Page 25 of the transcript notes.
[10] *Martinuzzi* v *The Queen*, 1999 CanLII 302 (TCC) [***Martinuzzi***].

[60] In the present case, the offer for sale of the Property during construction has proved to be irreconcilable with the intention to use it as the primary place of residence as required by applicable statute.

[61] The Court is of the view that the Appellant did not succeed, on the balance of probabilities, to establish that the Appellant's intention to construct the house was for use as her primary place of residence.

[62] According to the Court, the Appellant was not able to establish the key facts through the evidence on record at the end of the hearing that support her position and for that reason she failed to satisfy paragraph 256(2)(a) of the Act and 46(2)(a) of the Regulations.

[63] Moreover, the Appellant testified that the reasons for selling the Property were that she lost her employment due to the coronavirus disease (COVID-19) pandemic, her spouse lost a job opportunity due to the pandemic, and they felt they could not afford all the expenses, the bills, the taxes, and also having to pay for groceries, and the overall cost of living. According to the Appellant, it wasn't really reasonable at that point.

[64] In *Fard*, Deputy Judge Masse referring to *Sozio* [11] held that in order to invoke frustration as an excuse for a failure to actually use the rebate property as a primary place of residence, the surrounding circumstances must be such as to make the frustrating event unforeseeable, beyond the buyer's control, and results in the absence of real choice such that it makes living primarily and habitually at the rebate property impossible. [12]

[65] The surrounding circumstances to be considered for a finding of frustrated intent must be the circumstances existing at the appropriate time. In the present case, the appropriate time is the first evidence that the intention might not be as announced by the Appellant about her intention to use the Property as the primary place of residence.

[66] The Court believes the March 2020 listing, which is about 11 months after the construction began and 3 months before the end of the construction period, to be that

[11] *Sozio* v *The Queen*, 2018 TCC 258 [***Sozio***].
[12] *Fard* v *The Queen*, 2022 TCC 42 [***Fard***].

first evidence. The Appellant's answer to a clear question "Ms. Hammoud, you listed the property at 4400 Donato Drive in March of 2020?" was "Yes". The subsequent attempts by the Appellant to specify the exact date of the listing and the possibility of a listing month later in 2020 appear to the Court more like a distraction. The later attempts were not convincing and were not supported by other evidence or by circumstances that the Court could rely on. The Appellant did not advance any other date or period for the decision to sell the Property. For the Court, the Appellant's attempts were too vague and proved inconclusive.

[67] In March 2020, at the time the Appellant offers the Property for sale, the evidence shows very few unforeseeable events for the Appellant and her spouse except for the fact that the World Health Organization declared COVID-19 viral disease a pandemic on March 11, 2020. The expenses, taxes and bills relating to the Property were foreseeable, no employment was lost at that time. The electricity bills filed as exhibits by the Appellant for the period of July 24, 2019 to October 24, 2019 (3 bills) show a total of 140 kWh compared to 239 kWh for the period of February 24, 2020 to March 17, 2020 (the period of October 25, 2019 to February 23, 2020 was not filed) and to a total of 1,390 kWh for the period of August 17, 2020 to November 23, 2020. To the extent these bills are prior to March 2020, they do not show any excess material considerations.

[68] The confirmation of the pandemic in March 2020 created uncertainties for many Canadians, the impact of which likely varied from one person to another. In the present case, the Appellant had to submit evidence about the direct impact the pandemic imposed on her as early as in the first weeks the pandemic was confirmed. The reason for that is because the Property was offered for sale that month. As mentioned in *Fard* and *Sozio*, the Appellant had the burden of proving, on a balance of probabilities, that, in March 2020, the pandemic created a situation such as the Appellant had no real choice such that it makes living primarily and habitually at the Property impossible.

[69] In her Notice of Appeal filed with this Court on April 19, 2022, the Appellant referred to the pandemic causing her lost of employment (confirmed by a letter dated June 9, 2020) and her spouse losing a job opportunity (no details were provided at the hearing). No other reference is made to "COVID" or "pandemic" in the Notice of Appeal.

[70] During her testimony, the Appellant referred two times to "COVID" referring first to justify her lost of employment and second to justify that they accepted the first purchase offer for the Property. The word "pandemic" was pronounced 10 times by the Appellant during the hearing. Eight times during her testimony and cross-examination, and twice during her submissions. The eight times pronounced by the Appellant were in reference to (i) the fact that the construction of the house started before the pandemic, (ii) mention that she lost her employment, (iii) early in the pandemic they were not sure about the impact the pandemic could have on them so it created uncertainties, and (iv) uncertainties after she lost her employment and she returned to work during the pandemic. During her submissions, the Appellant referred twice to the pandemic as being responsible for her employment lost.

[71] During the testimony of the Appellant's spouse, "COVID" or "pandemic" was not mentioned.

[72] There are few doubts that the pandemic had negative impacts on the Appellant, including some effect of her decisions and choices. Unfortunately, from the evidence submitted during the hearing, the Court finds difficult to identify factors that created an impact as early as in March 2020 including from the pandemic that could prove, on the balance of probabilities, the absence of real choice such that it makes living primarily and habitually at the rebate property impossible. Essentially, the Appellant linked the pandemic during the hearing to her employment lost, which ultimately materialized in June 2020, and the fact that the pandemic raised uncertainties for them. No clear or undisputed evidence was submitted by the Appellant to crystallize the absence of real choice whether or not to live in the Property. The element of not having any choice but to sell has not been proven on the balance of probabilities.

[73] Also, no evidence was submitted by the Appellant supporting a quick sale of the Property or a sale subject to unfavourable conditions for the Appellant.

[74] Regrettably, the lack of evidence combined with the weakness of the evidence filed by the Appellant either documentary or by testimony, as a whole, are responsible for the Appellant not having been able to satisfy the burden of proof.

[75] Considering the foregoing, the Respondent's submission that the Appellant is not entitled to claim the Rebate as the Appellant and her spouse did not construct the

Property for use as their primary place of residence for purposes of paragraphs 256(2)(a) of the Act and 46(2)(a) of the Regulations shall prevail.

[76] On that basis, the Appellant's appeal cannot, unfortunately, succeed.

[77] There is no need to address the condition in paragraphs 256(2)(c) of the Act and 46(2)(b) of the Regulations.

V. Conclusion

[78] For all the reasons described above, the appeal against the Appellant's assessment made by notice dated June 3, 2021 is dismissed, without costs.

Signed at Montreal, Québec, this 10th day of May 2023.

"J.M. Gagnon"

Gagnon J.

CITATION:	2023 TCC 55
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REASONS FOR JUDGMENT BY:	The Honourable Justice Jean Marc Gagnon
DATE OF JUDGMENT:	May 10, 2023

APPEARANCES:

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